

## **Item SPR05-32 Response Form**

**Title:** Juvenile Dependency: Conflict of Interest Guidelines for Court-Appointed Counsel for Children (adopt Cal. Rules of Court, rule 1438.5)

- ☐ **Agree** with proposed changes
- ☐ **Agree** with proposed changes **only if modified**
- ☐ **Do not agree** with proposed changes

Comments: \_\_\_\_\_

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**Name:** \_\_\_\_\_ **Title:** \_\_\_\_\_

**Organization:** \_\_\_\_\_

**Address:** \_\_\_\_\_

**City, State, Zip:** \_\_\_\_\_

Please **write** or **fax** or **respond using the Internet** to:

**Address:** Ms. Romunda Price,  
Judicial Council, 455 Golden Gate Avenue,  
San Francisco, CA 94102  
**Fax:** (415) 865-7664      **Attention:** Romunda Price  
**Internet:** [www.courtinfo.ca.gov/invitationstocomment](http://www.courtinfo.ca.gov/invitationstocomment)

<b>DEADLINE FOR COMMENT:</b> 5:00 p.m., Monday, June 20, 2005
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Your comments may be written on this *Response Form* or directly on the proposal or as a letter. If you are not commenting directly on this sheet please remember to attach it to your comments for identification purposes.

*Circulation for comment does not imply endorsement by the Judicial Council, the Rules and Projects Committee, or the Policy Coordination and Liaison Committee.  
All comments will become part of the public record of the council's action..*

## Invitation to Comment (SPR05-32)

Title	Juvenile Dependency: Conflict of Interest Guidelines for Court-Appointed Counsel for Children (adopt Cal. Rules of Court, rule 1438.5)
Summary	<p>The proposed rule elaborates on the conflict of interest standard for counsel representing sibling groups in dependency matters as identified by the California Supreme Court in <i>In re Celine R. (Celine R.)</i> (2003) 31 Cal.4th 45. This rule will set forth general guidelines to assist both the court and court-appointed counsel for children in determining whether counsel should be appointed to represent, or continue to represent, a group of siblings in the same dependency proceeding.</p>
Source	<p>Family and Juvenile Law Advisory Committee Hon. Mary Ann Grilli and Hon. Susan D. Huguenor, Co-chairs</p>
Staff	<p>Melissa Ardaiz, 415-865-7567, melissa.ardaiz@jud.ca.gov Leah Wilson, 415-865-7977, leah.wilson@jud.ca.gov</p>
Discussion	<p>The Family and Juvenile Law Advisory Committee proposes the adoption of rule 1438.5 of the California Rules of Court to establish conflict of interest guidelines for court-appointed counsel for children in juvenile dependency proceedings. This rule will offer clarity to the court and court-appointed counsel for children in determining whether counsel should be appointed to represent, or continue to represent, a particular group of siblings in the same dependency proceeding.</p> <p>It is common practice in dependency proceedings for a single attorney to represent all children in a sibling group. While it is often possible for counsel to successfully represent the interests of more than one child, there exists a potential risk that the attorney will be confronted with a group of siblings whose interests conflict at some point. To account for this possibility, the California Supreme Court, in <i>In re Celine R. (Celine R.)</i> (2003) 31 Cal.4th 45, set forth a conflict of interest standard that specifically applies to children's counsel when representing a group of siblings within the same dependency proceeding.</p> <p><i>Celine R.</i> involved dependency proceedings initiated with respect to two siblings and their older half-sibling. The same attorney initially represented all three siblings. After efforts to reunify the family had failed, the two siblings were placed with their paternal uncle and his girlfriend, while the half-sibling was placed with her maternal aunt.</p>

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Visitation between the siblings and their half-sibling was no longer occurring. The paternal uncle and his girlfriend indicated that they would like to adopt the two full siblings, and the County Department of Social Services recommended a termination of parental rights to achieve that goal. Before parental rights were terminated, counsel for the children requested to “conflict out” of representing the two siblings due to the half-sibling’s concern that adoption would affect the sibling relationship. The juvenile court denied counsel’s request and terminated parental rights. Children’s counsel appealed. The Court of Appeal affirmed the trial court’s holding. The Supreme Court held that (1) the sibling-relationship exception to termination of parental rights set forth in Welfare and Institutions Code, section 366.26(c)(1)(E), permitted the court to consider possible detriment to the children who were being considered for adoption, but not detriment to their half-sibling; (2) the court should set aside judgment in a dependency proceeding due to error in not appointing separate counsel for a child or not relieving conflicted counsel only upon finding a reasonable probability that the outcome would have been different but for the error; and (3) any error in not relieving counsel from representing all three children was harmless under the circumstances of the case.

The *Celine R.* decision laid out guidelines regarding the appointment of separate counsel for siblings in dependency proceedings. The Court stated that “[w]hen first appointing counsel in a dependency matter, the court may generally appoint a single attorney to represent all the siblings. It would have to appoint separate attorneys if, but only if, there is an actual conflict among the siblings or if circumstances specific to the case—not just the potential for conflict that inheres in all multisibling dependency cases—present a reasonable likelihood an actual conflict will arise. If these specific circumstances exist, the court should appoint separate counsel at the outset rather than await an actual conflict and the possible disruption a later reappointment may cause. After the initial appointment, the court will have to relieve counsel from multiple representation if, but only if, an actual conflict arises.” (*Celine R.*, *supra*, 31 Cal.4th. at p. 58.)

The proposed rule would set forth the conflict of interest standard identified in *Celine R.* and elaborate on the standard by:

1. Emphasizing the ability of a single attorney to represent a group of siblings involved in the same dependency proceeding;
2. Offering fact scenarios which do not, standing alone, constitute a

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conflict of interest, in order to assist court-appointed counsel in identifying actual or reasonably likely conflicts; and

3. Outlining the appropriate procedure for court-appointed counsel and/or the court to follow once an actual conflict of interest has been identified.

The committee specifically invites comment on the implications of the proposed rule in situations where a legal services organization, as opposed to an individual attorney, is appointed as counsel of record.

The text of proposed rule 1438.5 is attached at pages 4–5.

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Attachments

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Rule 1438.5 of the California Rules of Court would be adopted, effective January 1, 2006 to read:

### **Rule 1438.5. Conflict of interest guidelines for court-appointed counsel for children in juvenile dependency proceedings**

#### **(a) [Appointment of counsel]**

(1) A single attorney may represent a group of siblings involved in the same dependency proceeding.

(2) An attorney must decline to represent a group of siblings, and the court must appoint a separate attorney to represent one or more of the siblings, if, at the outset of the proceedings:

(A) An actual conflict of interest exists among those siblings; or

(B) Circumstances specific to the case present a reasonable likelihood that an actual conflict of interest will arise among those siblings.

(3) The court may appoint a single attorney to represent a group of siblings under any of the following circumstances, which do not, standing alone, demonstrate an actual conflict of interest or a reasonable likelihood that an actual conflict of interest will arise:

(A) There is a purely theoretical or abstract conflict of interest among the siblings;

(B) The siblings express conflicting desires or objectives;

(C) The siblings give different or contradictory accounts of the events, but the issues involved are not material and/or the sibling's positions can be reconciled;

(D) The siblings have differing positions about material issues, but at least one of these positions lacks legal or factual foundation;

(E) The siblings have different permanent plans;

(F) The siblings are of different ages;

(G) Some of the siblings are more likely than others to be adoptable; or

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(H) The siblings have different parents.

### **(b) [Withdrawal from appointment or continued representation]**

(1) An attorney must request to withdraw from the representation of some or all of the siblings, and the court should relieve counsel from representation, if an actual conflict of interest arises during counsel's representation of the siblings. A reasonable likelihood of an actual conflict does not necessitate withdrawal.

(2) After an actual conflict of interest arises, the attorney may continue to represent siblings whose interests do not conflict only if:

(A) The attorney has successfully withdrawn from the representation of all siblings whose interests conflict with those of the siblings the attorney continues to represent;

(B) The attorney has exchanged no confidential information with any sibling(s) whose interests conflict with those of the sibling(s) the attorney continues to represent; and

(C) Continued representation of one or more siblings would not otherwise prejudice the other sibling or siblings.

### **Advisory Committee Comment**

Representation of multiple siblings in a dependency case is both permitted and encouraged. In *In re Celine R.* (2003) 31 Cal.4th 45, the California Supreme Court concluded that the juvenile court may appoint a single attorney to represent multiple siblings in a dependency case unless, at the time of the appointment, an actual conflict of interest exists among the siblings or it appears from circumstances specific to the case that an actual conflict is reasonably likely to arise. This rule is intended to elaborate on the *Celine R.* standard by (1) providing examples of circumstances in which an actual conflict of interest is not present or "reasonably likely" to arise, and (2) explaining the circumstances under which an attorney may continue representation despite the existence of an actual conflict of interest among some of the siblings.